APPENDIX A

DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT

No. 5D05-2597

RDC GOLF OF FLORIDA I, INC., *et al.*,
Appellant,

v.

GEORGE P. APOSTOLICAS,
Appellee.

March 17, 2006
Rehearing Denied April 19, 2006

Major B. Harding, of Ausley & McMullen, Tallahassee; John M. Brennan and Richard E. Mitchell of GrayRobinson, P.A., Orlando; James E. Cecchi of Carella, Byrne, Bain, Gilfillan, Cecchi, Stewart & Olstein, Roseland, New Jersey, for Appellant.

Michael R. Levin, of Baker & Hostetler, LLP, Orlando, for Appellee.

ORFINGER, *J.*

RDC seeks review of a final judgment confirming an arbitration award removing it as general partner of Heathrow Golf Company Limited Partnership. RDC alleges the trial court erred by rejecting its claim of evident partiality on the part of one of the arbitrators. We find no error and affirm.

Heathrow Golf is a Florida limited partnership formed to acquire and operate the Heathrow Country Club. George P. Apostolicas and the Schiavone Trust are the limited partners of Heathrow Golf, each owning approximately one-half of the

limited partnership interest. RDC was the sole general partner of Heathrow Golf. Pursuant to the parties' agreement, Apostolicas initiated arbitration against RDC, claiming mismanagement of the Heathrow Country Club. RDC and Heathrow counterclaimed, asserting that Apostolicas breached his fiduciary duty to the partnership by misappropriating Heathrow members for a competing golf club he owned. The issues were heard before a panel of three (3) arbitrators, including Chief Arbitrator Jim Grodin, that ultimately issued an arbitration award expelling RDC as the sole general partner of Heathrow.

Apostolicas petitioned to confirm the arbitration award. RDC and Heathrow filed a counter-petition, which sought to vacate the arbitration award, alleging that Chief Arbitrator Grodin was not impartial because he and Apostolicas's counsel, Michael Levin, were, while the arbitration was pending, involved in volunteer work for their synagogue relating to the renewal of the synagogue's contract with its rabbi. After an evidentiary hearing, the trial court rendered an order confirming the arbitration award, concluding that the relationship between Grodin and Levin was not substantial; that no reasonable person could conclude that the relationship would tend to bias Grodin's judgment; that there was no ex parte communication between Grodin and Levin regarding the subject matter of the arbitration; that the rabbi's contract transaction was synagogue volunteer work; that Levin's action did not curry favor with Grodin in the arbitration proceeding; and that RDC failed to establish the facts concerning the rabbi's contract that "might create an impression of possible bias" towards Apostolicas or Levin.

Of particular relevance to our consideration, the trial court made the following relevant findings of fact[1] and conclusions of law:

> 6. The case was set for Arbitration before Arbitrators James Grodin, James R. Lussier, and Joseph I. Goldstein. James Grodin was selected as the Chief Arbitrator.
>
> 7. On January 13, 2003, Mr. Grodin made the following initial disclosure regarding Apostolicas' counsel, Michael Levin:
>
> > I have known Mike Levin for over ten years. He and I have been on opposite sides of a case. He has represented religious organizations on whose board I served where I advocated his retention to represent the organization in litigation matters. His family and mine belong to the same Synagogue, and when I was Synagogue president, his wife served on the Executive Committee and Board over which I presided. I served as the sole arbitrator on a matter in which Mike Levin represented one of the sides.
>
> Neither party objected to Mr. Grodin serving as arbitrator after receiving this disclosure. The parties agreed to Grodin, Lussier, and Goldstein serving on the arbitration panel.
>
> 8. Over one year after Mr. Grodin' s initial disclosure, the arbitration hearing was held on May 3, 4, 5, 6, 7, 12, 14, and 21, 2004. On the first day of the arbitration hearing, Chief Arbitrator Grodin made the following disclosure:
>
> > As I stated off the record, the arbitrators and the attorneys here know each other. And my guess is that we wouldn't have been picked as arbitrators if the

[1] RDC does not challenge the findings of fact. It does, however, challenge the application of the facts to the law.

> attorneys did not know the arbitrators. So long as the litigants understand that, we have no problem proceeding.

No party objected to the panel serving after this disclosure was made.

9. Closing arguments were made on May 21, 2004. After the arbitration hearing concluded and as the participants were exiting the arbitration room towards the elevator, Chief Arbitrator Grodin said to Attorney Levin, "When you review the Rabbi's contract, please look at the footnotes because I may have made a mistake in the footnotes." Attorney Levin apologized that he had not yet had an opportunity to review the contract but told the Chief Arbitrator that he would review the contract on the plane. The court accepts Mr. Grodin's testimony regarding this conversation as credible. This conversation took place publicly between the Chief Arbitrator and Attorney Levin in a manner so that others present could hear them speaking to each other. This was not a secretive conversation "overheard" by Attorney Cecchi.

10. The parties submitted their proposed Memorandum of Arbitration Decision to the Arbitration Panel on June 18, 2004. The panel of arbitrators, Grodin, Lussier, and Goldstein, declared the arbitration hearing closed on July 7, 2004.

11. The panel of arbitrators, Grodin, Lussier, and Goldstein, unanimously issued the Interim Arbitration Award on August 6, 2004. In the Interim Arbitration Award, the panel of three arbitrators, among other things, found that RDC mismanaged Heathrow Golf and that the Heathrow Golf and Country Club suffered from RDC's lack of professional business management. The panel of three arbitrators expelled RDC as the general partner of Heathrow Golf. Apostolicas' claim for dam-

ages against RDC was denied. RDC's counterclaim that Apostolicas' development and marketing of Red Tail Golf and Country Club was a breach of a general fiduciary obligation of loyalty to Heathrow Golf was denied.

12. Three days later, on Monday, August 9, 2004, RDC filed its Petition to Vacate with the court, seeking to have the court vacate the Interim Arbitration Award that was issued in favor of Apostolicas.

13. RDC's Petition to Vacate raised the following objections to the Interim Arbitration Award in favor of Apostolicas: The arbitrators exceeded their powers and the Chief Arbitrator demonstrated evident partiality.

14. Regarding Chief Arbitrator Grodin's relationship with Attorney Levin, the Petition to Vacate, in relevant part, states as follows:

> Upon information, the Chief Arbitrator, James Grodin, has a professional relationship with Apostolicas' counsel, Michael Levin that was not properly disclosed to RDC or its Counsel. During the hearing, RDC overheard conversations suggesting that the Messrs. Grodin and Levin either represented the same person recently, or were working together on the same matter involving a Rabbi and Synagogue at the very same time the arbitration was pending. This relationship was never disclosed.

15. The conversation referenced in the Petition to Vacate between Chief Arbitrator Grodin and Attorney Levin was heard by RDC's counsel, James E. Cecchi, on May 21, 2004. Attorney Cecchi heard this conversation and took no action regarding the conversation until after RDC received the adverse award on August 6, 2004.

16. On August 11, 2004, RDC's counsel wrote to the AAA and provided the AAA with a copy of the Petition to Vacate filed on August 9, 2004, in circuit court and requested a full disclosure by Chief Arbitrator Grodin of his entire relationship with Attorney Levin.

17. On August 27, 2004, the parties received Chief Arbitrator Grodin's supplemental disclosure which stated, in relevant part, as follows:

> I drafted our Rabbi's employment contract for a Synagogue committee, which is negotiating it with Mr. Levin who serves as the Rabbi's representative. I advised the committee at the outset that I would not and could not have any contact with Mr. Levin on this matter.

* * *

37. Because there are no allegations of actual conflict or bias in this case, to vacate an arbitration award on the theory that undisclosed facts establish "evident partiality," RDC must show that the undisclosed circumstances would reasonably tend to bias the judgment of Chief Arbitrator Grodin. *See Deen v. Oster, supra; Boyhan v. Maguire, supra.* In this case, the undisclosed facts do not show circumstances which would reasonably tend to bias the judgment of Chief Arbitrator Grodin in favor of Michael Levin or his client, Apostolicas.

38. On January 31, 2003, Mr. Grodin made his initial disclosure that he and Attorney Levin were members of the same Synagogue. Approximately one year later, unbeknown to RDC, Messrs. Grodin and Levin's Synagogue, the COS [Congregation Ohev Shalom], decided to renew its engagement contract with its Rabbi. In February of 2004, the Executive Board of COS held a meeting and appointed Bill Sholk and Jim Grodin to negotiate the Rabbi's new employment contract. [FN]

Bill Sholk was present at this meeting. Jim Grodin was not. When Bill Sholk called Jim Grodin about the Rabbi's new contract, Jim Grodin told Bill Sholk that he would not work with Michael Levin because of this pending arbitration and that Bill Sholk would have to negotiate the contract for the Synagogue. It is clear from the evidence that Bill Sholk agreed to negotiate the turns of the contract for the Synagogue and that Jim Grodin agreed to draft the contract.

[FN] The Rabbi has an existing four year employment contract with COS that ends in August of 2005. Jim Grodin drafted this contract and the Rabbi's earlier contract with COS dating back to 1995. COS wanted to negotiate a new contract with the Rabbi before the existing contract expired.

39. The Court accepts the testimony of Bill Sholk as credible. The term sheets for the Rabbi's contract were negotiated by Bill Sholk and Michael Levin from March to April of 2004. Bill Sholk was not set up as a "Middle-man," as argued by RDC but, in fact, served as the negotiator on behalf of the Synagogue. Jim Grodin provided legal counsel to Bill Sholk and drafted the Rabbi's contract on behalf of the Synagogue. Jim Grodin prepared all of the drafts of the Rabbi's contract.

40. Jim Grodin was not a decision-maker with respect to the Rabbi's new contract. The congregation and Executive Board of COS and the Rabbi were the decision-makers.

41. It is uncontroverted that by April 18, 2004, Bill Sholk and Michael Levin reached complete agreement on all issues regarding the Rabbi's new 15 year . . . contract. On April 18, 2004, the renewal of the Rabbi's contract was taken before the COS at its Annual Meeting and the congregation voted to renew the Rabbi's contract

for 15 years . . . , with the terms as negotiated by Bill Sholk and Michael Levin. The same evening as the COS Annual Meeting, the Executive Board of the COS met and also approved the 15 year . . . contract as presented. After the April 18th meetings, when the business deal was negotiated and agreed upon by the Rabbi, the COS, the COS's Executive Board, the new contract terms were sent by Bill Sholk to Jim Grodin for Jim Grodin to "plug in terms."

42. The first draft of the Rabbi's contract as prepared by Jim Grodin was e-mailed to Bill Sholk on April 27, 2004. This draft was forwarded by Bill Sholk to Michael Levin on April 29, 2004. The April 27th contract was complete and included all of the negotiated terms. On April 27, Bill Sholk e-mailed Michael Levin and told him that this contract was going to be taken to the Board on April 28th at a special meeting for the sole purpose of the congregation formally agreeing on the contract. Bill Sholk ended this e-mail to Michael Levin by stating as follows, "We will get the blessing tomorrow night and after you look at and approve the contract, both sides can sign and put this to bed."

43. The arbitration hearing in this case began several days later on May 3, 2004, and concluded on May 21, 2004. It was on May 21, 2004, at the end of the arbitration hearing as everyone was leaving that Chief Arbitrator Jim Grodin generally said to Michael Levin in the presence of, at least, Attorney Cecchi, "When you review the Rabbi's contract, please look at the footnotes because I may have made a mistake in the footnotes." Michael Levin apologized that he had not yet had an opportunity to review the contract, but told the Chief Arbitrator he would review the contract on the plane.

44. On June 11, 2004, Michael Levin began contract negotiations again by raising severance and disability

issues. Disability became a contentious issue between Bill Sholk and Michael Levin for two reasons: (1) Bill Sholk thought Michael Levin was trying to change their previous agreement which had already been voted on and approved by the COS and (2) Bill Sholk was irritated by Michael Levin's strident and "obnoxious" e-mails. The e-mails produced by Jim Grodin reveal that Jim Grodin and Michael Levin were directly and indirectly receiving and sending e-mails regarding the Rabbi's employment from June 1 1 th to June 18th and from July 2nd to July 8th. The direct e-mails between Jim Grodin and Michael Levin occurred because Bill Sholk and Michael Levin began "sparking" with each other.

* * *

46. On June 16, 2004, Jim Grodin called Michael Levin on the telephone to tell him to "cut the crap," come up with a new suggestion and that the contract was going nowhere, that he needed to be positive, and to explain to Michael Levin the history behind the language in an earlier rabbi's contract with COS. The court accepts Jim Grodin' s testimony regarding this telephone conversation with Michael Levin as credible. Jim Grodin and Michael Levin did not discuss the substantive terms of the current Rabbi's contract renewal during this telephone call. The evidence establishes that Jim Grodin and Michael Levin did not discuss the pending arbitration during this telephone call.

47. On June 18, 2004, the parties submitted their proposed Memorandum of Arbitration Decision to the Arbitration Panel.

48. From July 2 through July 8, 2004, the disability and severance issues were resolved. Severance was not a contentious issue and was not included in the Rabbi's

contract. Disability was a contentious issue between Bill Sholk and Michael Levin. Bill Sholk sought counsel from Jim Grodin on how to deal with Michael Levin during this time frame. Ultimately, Bill Sholk and Michael Levin reached agreement on the disability issue on July 8, 2004.

49. On July 7, 2004, the Arbitration Panel declared the arbitration closed.

50. From July 8, 2004, until August 9, 2004, Michael Levin had no contact with anyone regarding the Rabbi's contract, except the Rabbi.

51. On August 6, 2004, the three-member Arbitration Panel issued the Interim Arbitration Award.

* * *

56. Florida requires that "evident partiality" be found only where a reasonable person would conclude that the undisclosed circumstances would tend to bias the judgment of a neutral arbitrator. The alleged partiality must be direct, definite, and capable of demonstration rather than remote, uncertain, and speculative. A reasonable person looking at the undisclosed circumstances in the instant case would conclude that Jim Grodin's involvement with the renewal of the Rabbi's engagement contract and relationship with Michael Levin would not "tend to bias his judgment" in the arbitration proceeding.

57. RDC argues that Jim Grodin's undisclosed involvement with the Rabbi's engagement contract renewal requires vacatur because it was: (a) concurrent with the arbitration; (b) fraught with numerous opportunities for ex-parte contact and favoritism; and (c) material as to time, value and relationship.

58. The Rabbi's contract renewal did occur during the parties' arbitration proceeding. The Rabbi's contract renewal began in early 2004 and ended on September 9, 2004, when the Synagogue and Rabbi signed the new engagement contract. The parties' arbitration began on October 2, 2002, and ended with the rendition of the Final Arbitration Award on October 25, 2004. Clearly, the undisclosed relationship between Jim Grodin and Michael Levin occurred during the arbitration proceedings, including the arbitration hearing, deliberation and rendition of the Arbitration Award.

59. While Jim Grodin' s undisclosed relationship with Michael Levin was concurrent with the arbitration proceedings, this relationship was not a substantial relationship. There were no ex-parte communication between Jim Grodin and Michael Levin regarding the subject matter of the arbitration proceeding. The arbitration was mentioned in the Rabbi's contract renewal one time in an e-mail from Michael Levin to Bill Sholk dated June 11, 2004 which stated, in relevant part, as follows: "I have been immersed in an arbitration immediately followed by a family trip to England . . . Because of the delay and the possibility that you are now on vacation, I am taking the liberty of forwarding this draft to Burt Chasnov, Jim Grodin and Jeff Bornstein, all of whom I understand to be involved on your side of the negotiations." This e-mail was also copied to Burt Chasnov, Jim Grodin and Jeff Bornstein by Michael Levin. The arbitration was also mentioned by Jim Grodin to Bill Sholk at the beginning of the contract renewal process as the reason that Jim Grodin would not negotiate the Rabbi's new contract with Michael Levin.

60. RDC correctly argues that the Rabbi's contract that was renewed for 15 years . . . was a material contract. While this clearly was a material contract for

the COS and the Rabbi, this material contract did not create a substantial relationship between Jim Grodin and Michael Levin. Both attorneys were volunteering their time and their talents to help their Synagogue renew its contract with its Rabbi. Jim Grodin already had previous COS engagement contracts on his computer because he had produced several other employment contracts on behalf of the COS for this Rabbi and other rabbis and cantors.

61. By the time Jim Grodin became involved with the instant contract renewal, both the congregation of COS and its Executive Board had already voted to approve a 15 year . . . engagement contract for its Rabbi and these material terms were never an issue. While the disability issue was also a material issue, a contentious issue and an issue with which Jim Grodin had some involvement, it is uncontroverted that the disability issue could not have been a deal breaker. Bill Sholk testified that the Rabbi was staying, that one item would not be a deal breaker, and that they just needed to reach an agreement. The court accepts this testimony as credible and assigns little weight to the fact that the disability issue became a contentious issue for a period of time during the June 11th-18th and July 2nd-8th negotiations and to the fact that Jim Grodin had some involvement with the disability issue or any of the contract issues. The Rabbi's written engagement contract was going to be finalized, it was just a matter of when. The COS had already voted to keep their Rabbi for fifteen years, until the Rabbi retired. The length and salary had already been agreed upon by both the COS and the Rabbi. The terms of the contract, even material ones, were going to be worked out because the congregation wanted this Rabbi as their Rabbi until he retired. This was volunteer Synagogue work and Jim Grodin wanted to expeditiously finalize the Rabbi's new engagement contract.

62. Michael Levin did not do anything in the Rabbi's contract renewal that curried favor with Jim Grodin in the arbitration proceeding: There were no real life opportunities for a "quid pro quo" created by the undisclosed circumstances in this case. The "Thanks Mike" e-mail from Jim Grodin to Michael Levin on June 16, 2004, for making a different proposal on the disability issue proposal is not evidence that Michael Levin had curried favor with Jim Grodin in the arbitration proceeding. A review of Jim Grodin's relationship with Michael Levin in the Rabbi's contract renewal would not lead a reasonable person to believe that a potential conflict exists in the arbitration proceeding.

63. RDC argues that former Chief Arbitrator Grodin's nondisclosure was designed to conceal his relationship with Attorney Levin. The court disagrees. The court notes that Jim Grodin made a general disclosure that he and Michael Levin were members of the same Synagogue. There is no evidence to establish that the Chief Arbitrator's nondisclosure in this case was calculated to conceal his involvement in the Rabbi's contract renewal. The court bases this conclusion in part on the fact that Chief Arbitrator Grodin spoke openly to Attorney Levin in front of, at least, Attorney Cecchi about the Rabbi's contract renewal. This is not conduct consistent with a plan to conceal Jim Grodin's involvement with the Rabbi's contract renewal. The court concludes from all the evidence that former Chief Arbitrator Grodin did not disclose his involvement in the Rabbi's contract renewal because he thought his involvement was trivial.

64. A reasonable person, considering all the undisclosed evidence in this case, would not conclude that Jim Grodin's involvement with Michael Levin in the Rabbi's contract renewal would tend to bias his judgment in

favor of Apostolicas or Michael Levin in the arbitration proceeding. RDC has not established that the undisclosed facts in this case "might create an impression of possible bias" towards Apostolicas or Michael Levin in the arbitration proceeding. There is no "evident partiality" in this case.

65. The evidence establishes that Chief Arbitrator Grodin drafted the Rabbi's contract on behalf of the Synagogue and served as the attorney for the Synagogue and that Bill Sholk negotiated the terms of the contract on behalf of the Synagogue. Michael Levin represented the Rabbi in the contract negotiations. The drafting and negotiation of the Rabbi's contract occurred concurrent with the arbitration proceedings, including the arbitration hearing and deliberations. RDC was unaware of the roles Messrs. Grodin and Levin played in the renewal of the Rabbi's contract until RDC filed its Petition to Vacate the Interim Arbitration Award.

* * *

67. The court concludes that Chief Arbitrator Grodin should have fully disclosed his involvement with Michael Levin in the renewal of the Rabbi's engagement contract. The Chief Arbitrator did not do so in a timely manner during the arbitration proceeding.

68. As stated by the Fourth District in *Weinger v. State Farm Fire & Casualty*, 620 So.2d 1298, 1299 (Fla. 4th DCA 1993), "It is now clear that an arbitrator has an affirmative duty to disclose any dealings that might create an impression of possible bias." The *Weinger* court continued, "Failure to disclose such an association undermines the appearance of propriety and the confidence of the fairness of the proceedings and requires the vacation of the award." Id. [sic]. While the undisclosed circumstances in this case do not rise to the

> level of "might create an impression of possible bias," Chief Arbitrator Grodin should have fully disclosed them anyways [sic]. For the reasons stated in this order, former Chief Arbitrator Grodin's non-disclosure does not warrant vacating the Final Arbitration Award.

(Most internal footnotes omitted).

DISCUSSION

RDC argues that it did not have the benefit of an impartial arbitration panel because during critical phases of the arbitration proceeding, Chief Arbitrator Grodin and Apostolicas's counsel, Levin, were both involved in a material contract transaction. RDC claims that Grodin and Levin failed to disclose, actively concealed, and then misrepresented the existence and extent of their relationship with respect to the contract transaction. RDC further asserts that this relationship "might create an impression of possible bias" to a reasonable party in the position of RDC and Heathrow, and, consequently, the arbitration award should be vacated.

STANDARD OF REVIEW

A high degree of conclusiveness attaches to an arbitration award. *Deen v. Oster*, 814 So.2d 1065, 1068 (Fla. 4th DCA 2001); *see Charbonneau v. Morse Operations, Inc.*, 727 So.2d 1017, 1019 (Fla. 4th DCA 1999). To vacate an arbitration award, a party must establish one of the five statutory grounds set forth in section 682.13(1)(a)-(e), Florida Statutes (2004). *See Commo'ns Workers of Am. v. Indian River County Sch. Bd.*, 888 So.2d 96, 99 (Fla. 4th DCA 2004). When the party moving to vacate fails to prove one of the five statutory grounds, "neither a circuit court nor a district court of appeal has the authority to overturn the award." *Schnurmacher Holding, Inc. v. Noriega*, 542 So.2d 1327, 1328 (Fla.1989). Appellate review of orders granting or denying a motion to vacate an arbitration award are governed by "the same standards as in any ordinary case, whereby

findings of fact are reviewed under a competent and substantial evidence standard and legal questions are reviewed de novo." *See Boyhan v. Maguire*, 693 So.2d 659, 662 (Fla. 4th DCA 1997); *see also Noriega* (explaining that in reviewing an arbitration award, the reviewing court may not comb the record of the arbitration hearing for errors of fact or law inherent in the decision-making process).

EVIDENT PARTIALITY

Both Florida and federal law hold that evident partiality is a basis to vacate an arbitration award. § 682.13(1)(b), Fla. Stat. (2004); 9 U.S.C. § 10(a)(2). Because Florida's arbitration statute is modeled after the Federal Arbitration Act, federal decisions are highly persuasive. *See Seretta Constr., Inc. v. Great Am. Ins. Co.*, 869 So.2d 676, 679 (Fla. 5th DCA 2004). However, while decisions of federal courts are persuasive, we are bound only by decisions of the United States Supreme Court. *See Mora v. Abraham Chevrolet-Tampa, Inc.*, 913 So.2d 32, 35 (Fla. 2d DCA 2005); *Raymond James Fin. Servs., Inc. v. Saldukas*, 851 So.2d 853, 856 (Fla. 2d DCA 2003).

Here, the trial court determined that Grodin should have fully disclosed his involvement with Levin in the contract proceedings. Nevertheless, the trial court confirmed the arbitration award based on its conclusion that the undisclosed circumstances did not create an impression of possible bias. RDC argues that the trial court applied the wrong legal standard, erroneously relying on *Lifecare International, Inc. v. CD Medical, Inc.*, 68 F.3d 429, 432 (11th Cir.1995), which held that the "mere appearance of bias or partiality is not enough to set aside an arbitration award." RDC contends that the standard established in *Lifecare* conflicts with the more recent Eleventh Circuit case of *University Commons-Urbana Ltd. v. Universal Constructors, Inc.*, 304 F.3d 1331, 1339 (11th Cir.2002), as well as Florida law set forth in *Weinger v.*

State Farm Fire & Casualty Co., 620 So.2d 1298, 1299 (Fla. 4th DCA 1993).

A. Florida Law

Section 682.13(1)(b), Florida Statutes (2004), provides that a "court shall vacate an award when . . ." "'[t]here was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or umpire or misconduct prejudicing the rights of any party.'" *Deen*, 814 So.2d at 1068; *see Int'l Ins. Co. v. Schrager*, 593 So.2d 1196, 1197 (Fla. 4th DCA 1992); *see also Weinger*, 620 So.2d at 1299 (holding that in arbitration cases, "it is clear that an arbitrator has an affirmative duty to disclose any dealings that might create an impression of possible bias"). However, an arbitration award may only be set aside upon the "showing of circumstances which would reasonably tend to bias the judgment of an impartial arbitrator." *Boyhan*, 693 So.2d at 662.

B. Federal Law

The Federal Arbitration Act likewise authorizes the court to vacate an arbitration award "where there was evident partiality . . . in the arbitrators, or either of them." 9 U.S.C. § 10(a)(2). However, "evident partiality, like obscenity, is an elusive concept: one knows it when one sees it, but it is awfully difficult to define in exact terms. No jurist has yet coined an exacting legal standard for 'evident partiality,' although many have tried." *Cont'l Ins. Co. v. Williams*, No. 84-2646-CIV-MARCUS, 1986 WL 20915, *3-4 (S.D.Fla. Sept.17, 1986) (citations omitted). The definitional difficulties of "evident partiality" notwithstanding, it is settled that the evident partiality inquiry is a case-specific and fact-intensive one. *See Lifecare*, 68 F.3d at 435 (stating that the question of evident partiality is "fact intensive" and "highly dependant on the unique factual settings of each particular case").

The leading United States Supreme Court case concerning claims of arbitral evident partiality is *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968). Thus, any inquiry must begin there. In *Commonwealth Coatings*, the United States Supreme Court addressed the circumstances under which 9 U.S.C. § 10(a)(2) authorizes the vacation of an arbitration award for failure to disclose the existence of a close financial relationship between a neutral arbitrator and a party to the arbitration. 393 U.S. at 146-48, 89 S.Ct. 337. In that case, one arbitrator of a three-arbitrator panel failed to inform the plaintiff that the defendant had been a sporadic customer of the arbitrator's business, and that the relationship went so far as to include the rendering of services on the very projects involved in the arbitration. After the arbitration panel made a unanimous decision in favor of the defendant, the plaintiff learned of the business relationship between the arbitrator and the defendant and challenged the award on the basis that the arbitrator's failure to disclose his prior business relationship resulted in "evident partiality," thereby, warranting a vacation of the award. The Supreme Court held that the arbitrator's failure to disclose these facts justified vacation of the arbitration award, noting that it is not only actual bias, but the *appearance of bias* that must be excluded from judicial and arbitral forums. *Id.* at 146-50, 89 S.Ct. 337.

In delivering the Court's opinion[2] in *Commonwealth Coatings*, Justice Black wrote:

> It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the single requirement that *arbitrators disclose to the parties any dealings that might create an impression of possible bias*.

Id. at 149-50, 89 S.Ct. 337 (emphasis supplied). To us, it appears that the Supreme Court in *Commonwealth Coatings* envisioned that an arbitrator's award could be challenged on the basis of bias, when the challenging party presented facts

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[2] Whether *Commonwealth Coatings* is a plurality opinion or a majority opinion is an open question. Most courts, including the Eleventh Circuit, have concluded that *Commonwealth Coatings* is a plurality opinion. *See, e.g., Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197 (11th Cir.1982); *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640 (6th Cir.2005); *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358 n. 19 (6th Cir.1989); *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681-82 (7th Cir.1983); *Austin South I, Ltd. v. Barton-Malow Co.*, 799 F.Supp. 1135, 1141 (M.D.Fla.1992) (stating that *Commonwealth Coatings* is a plurality opinion, and, therefore, the Court's holding may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds). Other courts have found to the contrary. *See, e.g., Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 436 F.3d 495 (5th Cir.2006); *Schmitz v. Zilveti*, 20 F.3d 1043, 1045 (9th Cir.1994) (stating that *Commonwealth Coatings* is not a plurality opinion because Justice White joined in the majority opinion although he wrote "additional remarks").

that, viewed reasonably, gave rise to an "impression of possible bias." 393 U.S. at 149-50, 89 S.Ct. 337.

Following *Commonwealth Coatings*, the interpretation of what has come to be referred to as the "reasonable impression of partiality" standard has varied somewhat among the different federal courts considering it.[3] The Eleventh Circuit has said that an arbitration award may be vacated due to the "evident partiality" of an arbitrator only when either (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information that would lead a reasonable person to believe that a potential conflict exists. *Univ. Commons-Urbana Ltd.*, 304 F.3d at 1339; *Middlesex Mut. Ins. Co.*, 675 F.2d 1197, 1202 (11th Cir.1982). The party challenging the arbitration award must demonstrate that the undisclosed information creates a "reasonable impression of partiality," *Lifecare*, 68 F.3d at 433 (citation omitted), or put another way, "information which would lead a reasonable person to believe that a potential conflict exists." *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir.1998) . The alleged partiality must be "direct, definite and capable of demonstration rather than remote, uncertain, and speculative." *Id.; see Scott v. Prudential Sec., Inc.*, 141 F.3d 1007, 1015 (11th Cir.1998) (holding that "to vacate an arbitration award for evident partiality, the moving party must present evidence that would support a 'reasonable impression of partiality' on the arbitrator's behalf . . . [t]he assertion of partiality, however,

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[3] Several courts have remarked on the muddled state of the law concerning evident partiality, due in part to this decision. *See Morelite Constr. Corp.*, 748 F.2d at 82-84; *Merit Ins. Co.*, 714 F.2d at 681-82; *see also Burlington N. R.R. v. TUCO*, 960 S.W.2d 629, 634 (Tex.1997) (commenting on the two conflicting standards that the federal courts have adopted in wake of *Commonwealth Coatings*).

must be 'direct, definite and capable of demonstration rather than remote, uncertain and speculative'").[4]

Whether these conditions have been met ordinarily requires a fact-intensive inquiry. *Lifecare*, 68 F.3d at 435. In general, "the mere appearance of bias or partiality is not enough to set aside an arbitration award." *Id.* at 433 (citing *Consol. Coal Co. v. Local 1643, United Mine Workers of Am.*, 48 F.3d 125, 129 (4th Cir.1995)). If, however, the moving party can show that an arbitrator failed to disclose a substantial relationship between himself and a party, then the less demanding "appearance of bias" standard applies. *Park v. First Union Brokerage Servs., Inc.*, 926 F.Supp. 1085, 1088 (M.D.Fla. 1996) (citing *Commonwealth Coatings*, 393 U.S. at 151-52, 89 S.Ct. 337 (White, J., concurring)).

Other courts have reached similar conclusions, i.e., that the party challenging the arbitration award is required to present admissible, credible evidence that created an impression of bias that is direct, definite, and capable of demonstration, rather than a mere appearance of a remote, uncertain, and speculative bias. *See, e.g., Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 626 (6th Cir.2002) ("The alleged partiality must be direct, definite, and capable of demonstration, and the party asserting evident partiality must establish specific facts that indicate improper motives on the

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[4] The burden of proof with regard to claims of evident partiality and arbitrator misconduct or misbehavior prejudicing the rights of a party rests with the party raising such allegations. That burden is substantial, extending beyond the mere appearance of impropriety to something approximating clear and convincing evidence of material wrongdoing. Thus, in the absence of substantial, direct proof that one or more of the types of misconduct addressed in section 10(a)(2) of the Federal Arbitration Act has transpired, coupled with a demonstrated link between that the untoward behavior and the challenged arbitral result, the prospects for the vacation of the arbitration award are doubtful. Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GALR 731, 748-49 (1996) (internal citations omitted).

part of the arbitrator."); *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir.1993) (stating that the alleged partiality must be direct, definite, and capable of demonstration rather than remote, uncertain, and speculative); *Employers Ins. of Wausau v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 933 F.2d 1481, 1489 (9th Cir.1991) (a party "must demonstrate more than a mere appearance of bias to disqualify an arbitrator"); *Washburn v. McManus*, 895 F.Supp. 392, 398 (D.Conn.1994) (stating that there must be more than mere appearance of bias to vacate arbitrator's award); *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1264 (7th Cir.1992) (determining that evident partiality within the meaning of subsection (a) of the FAA means more than the mere appearance of bias; to set aside an award for arbitration partiality, the interest or bias must be direct, definite, and capable of demonstration rather than remote, uncertain, or speculative); *Waverlee Homes, Inc. v. McMichael*, 855 So.2d 493 (Ala.2003) (holding that under "reasonable impression of partiality standard," party challenging arbitration award was required to present admissible, credible evidence that created an impression of bias that is direct, definite, and capable of demonstration, rather than a mere appearance of a remote, uncertain, and speculative bias); *see also Consol. Coal Co.*, 48 F.3d at 129 (determining that to demonstrate evident partiality under the FAA, the party seeking vacation has burden of proving that a reasonable person would have to conclude that the arbitrator was partial to the other party to the arbitration, and the reasonable person standard requires a showing of more than the appearance of bias); *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir.1984) (holding that " 'evident partiality' within the meaning of 9 U.S.C. § 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration"); *Metro. Prop. & Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co.*, 780 F.Supp. 885, 891

(D.Conn.1991) (stating that the party alleging impropriety "must establish facts that create a reasonable impression of bias or misconduct") (citations omitted).

We conclude that the weight of authority developed after *Commonwealth Coatings* requires a review of the evidence utilizing the "reasonable impression of partiality" standard. As such, we find that the trial court properly weighed RDC's allegations of Grodin's evident partiality by considering whether RDC made a showing through credible evidence, giving rise to a "reasonable impression of partiality" that was "direct, definite, and capable of demonstration," as distinct from a "mere appearance" of bias that was remote, uncertain, and speculative.

C. Application of the Prevailing Law

Commonwealth Coatings does not establish a per se rule requiring vacatur of an award whenever an undisclosed relationship is discovered. *See Lucent Techs. Inc. v. Tatung Co.*, 379 F.3d 24, 30 (2d Cir.2004).[5] Instead, only dealings that "might create an impression of possible bias" must be disclosed. *Lifecare*, 68 F.3d at 433; *Weinger*, 620 So.2d at 1299. This does not require arbitrators to provide the parties

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[5] RDC relies on cases from other jurisdictions that contravene the rule adopted in Florida and the Eleventh Circuit. *See, e.g., Henry v. Halliburton Energy Servs.*, 100 S.W.3d 505, 509 (Tex.App.2003) (finding that the evident partiality is established from the *nondisclosure itself*; regardless of whether the nondisclosed information necessarily establishes partiality or bias); *Valrose Maui, Inc. v. Maclyn Morris, Inc.*, 105 F.Supp.2d 1118 (D.Hawai'i 2000) (concluding that the mere appearance of bias created by even good faith ex parte communications was sufficient to show "evident partiality"); *Kern v. 303 East 57th Street Corp.*, 204 A.D.2d 152, 611 N.Y.S.2d 547 (1994) (holding that the appearance of impropriety or partiality is sufficient to warrant vacature of an arbitration award; it is only necessary to demonstrate the potential for bias to find misconduct). Because these cases are not consistent with the standard articulated by Florida courts and the Eleventh Circuit, they are not controlling.

with a "complete and unexpurgated business biography." *Commonwealth Coatings*, 393 U.S. at 151, 89 S.Ct. 337 (White, J., concurring). "Whether ties are so indirect or remote that they could not reasonably create an impression of bias is a question that must be answered by reference to the facts of the particular case." *Sanko S.S. Co. v. Cook Indus., Inc.*, 495 F.2d 1260, 1264 n. 3 (2d Cir.1973).

As the trial court determined, Grodin should have disclosed his involvement with Levin in the renewal of the Rabbi's employment contract. Nevertheless, as the trial court found, it does not appear that Grodin's non-disclosure created a *reasonable* impression of partiality, thereby, warranting the vacation of the final arbitration award. There was no evidence that Levin did, or could have done anything in the negotiations of the Rabbi's contract renewal to curry favor with Grodin in the arbitration proceedings, or that Grodin's contact with Levin regarding the Rabbi's contract renewal was substantial. Although Grodin and Levin's relationship did exist at the same time as the arbitration proceeding, Grodin had no financial interest in the Rabbi's contract. The trial court's findings, supported by substantial, competent evidence, establish that the Rabbi's contract was substantially negotiated between Levin and Bill Sholk between February 2004 and April 2004, before the arbitration was heard. While the disability issue arose during the course of the arbitration proceedings, it was not an essential term, and it was only on this issue that there was any contact between Grodin and Levin. This limited contact falls short of evidence demonstrating that Levin curried favor with Grodin in the arbitration proceeding.

Further, contrary to RDC's assertion, it does not appear that Grodin's non-disclosure was designed to conceal his relationship with Levin. Grodin made a general disclosure that he and Levin were members of the same synagogue. Grodin also spoke openly to Levin about the Rabbi's contract

renewal in the presence of RDC's attorney. As the trial court concluded, this is not conduct that is consistent with a plan to conceal.

Here, RDC asks this Court to conclude that because Grodin failed to disclose his involvement with Levin in the renewal of the Rabbi's employment contract, the arbitration award should be vacated. We cannot reach that conclusion. The facts of this case do not show bias or partiality that is direct, definite, and capable of demonstration. *Lifecare*, 68 F.3d at 433; *see Local 530, AFSCME, Council 15 v. City of New Haven*, 9 Conn.App. 260, 518 A.2d 941, 947 (1986) (holding that even under the "appearance of bias" standard, that appearance must be reasonable; "[t]he mere speculative statement of bias by a participant in the arbitration proceeding does not in and of itself justify a claim of disqualification").

Because we conclude that the trial judge's findings of fact are supported by competent, substantial evidence, and that the correct rule of law was applied, we affirm.

AFFIRMED.

APPENDIX B

SUPREME COURT OF FLORIDA
THURSDAY, SEPTEMBER 21, 2006

CASE NO.: SCO6-913
Lower Tribunal No.: 5D05-2597

RDC GOLF OF FLORIDA I, INC., ETC., *et al.*
Petitioner,

vs.

GEORGE P.APOSTOLICAS,
Respondent.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

The motion for attorneys' fees is granted and it is ordered that respondent shall recover from petitioner the amount of $2,500.00 for the services of respondents attorney's in this Court.

PARIENTE, QUINCE, CANTERO and BELL, JJ., concur.

LEWIS, C.J., dissents.

A True Copy
Test:

/s/ Thomas D. Hall [seal]
THOMAS D. HALL
Clerk, Supreme Court

mc
Served:

HON. SUSAN WRIGHT, CLERK
JAMES E. CECCHI
MICHAEL R. LEVIN
HON. DONNA L. MCINTOSH, JUDGE
HON. MARYANNE MORSE, CLERK
JOHN M. BRENNAN
RICHARD E. MITCHELL
JOHN R. BERANEK
MAJOR B. HARDING

APPENDIX C

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

CASE NO. 04-CA-1740-16-G CONSOLIDATED

RDC GOLF OF FLORIDA I, INC., a Florida Corporation, and
HEATHROW GOLF COMPANY LIMITED PARTNERSHIP,
a Florida Limited Partnership,
Petitioners,

vs.

GEORGE P. APOSTOLICAS, Individually and Derivatively of
HEATHROW GOLF COMPANY LIMITED PARTNERSHIP,
a Florida Limited Partnership,
Respondents.

CASE NO. 04-CA-2315-16-G

GEORGE P. APOSTOLICAS, Individually and Derivatively of
HEATHROW GOLF COMPANY LIMITED PARTNERSHIP,
a Florida Limited Partnership,
Petitioners,

vs.

RDC GOLF OF FLORIDA I, INC., a Florida Corporation, and
HEATHROW GOLF COMPANY LIMITED PARTNERSHIP,
a Florida Limited Partnership,
Respondents.

ORDER CONFIRMING FINAL ARBITRATION AWARD

THIS CAUSE came for final hearing on May 4, 5, and 6, 2005 upon RDC Golf of Florida I, Inc.'s Amended Petition to Vacate Arbitration Award, filed September 24, 2004, and

Counter-Petition to Vacate Interim and Final Arbitration Awards filed November 15, 2004, and George P. Apostolicas' Petition for Confirmation of the Final Arbitration Award, filed November 2, 2004. The court, after having considered the parties' respective petitions, evidence, arguments, and memoranda of law, hereby makes the following findings of fact and conclusions of law:

BACKGROUND

1. The Heathrow Golf Company Limited Partnership ("Heathrow Golf") was formed to own and operate the Heathrow Golf and Country Club located in Heathrow, Florida. The Limited Partnership Agreement sets out the rights, responsibilities and obligations of the general partner and limited partners. The Limited Partnership Agreement provided for arbitration of disputes between the parties to the Agreement.

2. The Ronald A. Schiavone Living Trust ("Schiavone Trust") and George P. Apostolicas ("Apostolicas") are the limited partners in Heathrow Golf. Ronald A. Schiavone is the sole trustee of the Schiavone Trust. RDC Golf of Florida I, Inc. ("RDC") is the general partner of Heathrow Golf. Christopher R. Schiavone, Ronald A. Schiavone's son, is the principal of RDC.

3. On October 2, 2002, Apostolicas filed a derivative and individual complaint with the American Arbitration Association ("AAA"), asserting that RDC, as the general partner of Heathrow Golf, damaged Heathrow Golf by RDC's mismanagement and breach of its duties and responsibilities to the partnership. Apostolicas sought the expulsion of RDC as the general partner and damages.

4. ROC denied the complaint and counterclaimed asserting that Apostolicas interfered with RDC' s management of the Heathrow Golf and Country Club and that Apostolicas breached his general fiduciary duty to Heathrow Golf by

participating in the development and marketing of Red Tail Golf and Country Club in Lake County, Florida.

5. The attoneys representing RDC were James E. Cecchi of Carella, Byrne, Bain, et al. and John M. Brennan of GrayRobinson, P.A. The attorneys representing Apostolicas were Michael R. Levin and Leslie Bissinger of Baker & Hostetler, LLP.

6. The case was set for Arbitration before Arbitrators James Grodin, James R. Lussier, and Joseph I. Goldstein. James Grodin was selected as the Chief Arbitrator,

7. On January 31, 2003, Mr. Grodin made the following initial disclosure regarding Apostolicas' counsel, Michael Levin:

> I have known Mike Levin for over ten years. He and I have been on opposite sides of a case. He has represented religious organizations on whose board I served where I advocated his retention to represent the organization in litigation matters, His family and mine belong to the same Synagogue, and when I was Synagogue president, his wife served on the Executive Committee and Board over which I presided. I served as a sole arbitrator on a matter in which Mike Levin represented one of the parties.

Neither party objected to Mr. Grodin serving as arbitrator after receiving this disclosure. The parties agreed to Grodin, Lussier, and Goldstein serving on the arbitration panel.

8. Over one year after Mr. Grodin' s initial disclosure, the arbitration hearing was held on May 3, 4, 5, 6, 7, 12, 14, and 21, 2004. On the first day of the arbitration hearing, Chief Arbitrator Grodin made the following disclosure:

> As I stated off the record, the arbitrators and the attorneys here know each other. And my guess is that we wouldn't have been picked as arbitrators if the attorneys

> had not known the arbitrators. So long as the litigants understand that, we have no problem proceeding.

No party objected to the panel serving after this disclosure was made.

9. Closing arguments were made on May 21, 2004. After the arbitration hearing concluded and as the participants were exiting the arbitration room towards the elevators, Chief Arbitrator Grodin said to Attorney Levin, "When you review the Rabbi's contract, please look at the footnotes because I may have made a mistake in the footnotes." Attorney Levin apologized that he had not yet had an opportunity to review the contract, but told the Chief Arbitrator that he would review the contract on the plane.[1] The court accepts Mr. Grodin's testimony regarding this conversation as credible. This conversation took place publicly between the Chief Arbitrator and Attorney Levin in a manner so that others present could hear them speaking to each other, This was not a secretive conversation "overheard" by Attorney Cecchi.

10. The parties submitted their proposed Memorandum of Arbitration Decision to the Arbitration Panel on June 18, 2004. The panel of arbitrators, Grodin, Lussier, and Goldstein, declared the arbitration hearing closed on July 7, 2004.

11. The panel of arbitrators, Grodin, Lussier, and Goldstein, unanimously issued the Interim Arbitration Award on August 6, 2004. In the Interim Arbitration Award, the panel of three arbitrators, among other things, found that RDC mismanaged Heathrow Golf and that the Heathrow Golf and Country Club suffered from RDC's lack of professional business management. The panel of three arbitrators expelled RDC as the general partner of Heathrow Golf. Apostolicas'

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[1] Michael Levin and his family were flying to England on May 25, 2004 for a vacation. This family vacation had been made known to the arbitration panel and parties for scheduling purposes.

claim for damages against RDC was denied. RDC's counterclaim that Apostolicas' development and marketing of Red Tail Golf and Country Club was a breach of a general fiduciary obligation of loyalty to Heathrow Golf was denied. Apostolicas was determined to be the prevailing party in the arbitration for purposes of recovering fees and costs.

12. Three days later, on Monday, August 9, 2004, RDC filed its Petition to Vacate with the court, seeking to have the court vacate the Interim Arbitration Award that was issued in favor of Apostolicas.[2]

13. RDC's Petition to Vacate raised the following objections to the Interim Arbitration Award in favor of Apostolicas: The arbitrators exceeded their powers and the Chief Arbitrator demonstrated evident partiality.

14. Regarding Chief Arbitrator Grodin's relationship with Attorney Levin, the Petition to Vacate, in relevant part, states as follows:

> Upon information, the Chief Arbitrator, James Grodin, has a professional relationship with Apostolicas' counsel, Michael Levin that was not properly disclosed to RDC or its Counsel. During the hearing, RDC overheard conversations suggesting that the Messrs. Grodin and Levin either represented the same person recently, or were working together on the same matter involving a Rabbi and Synagogue at the very same time the arbitration was pending. This relationship was never disclosed.

15. The conversation referenced in the Petition to Vacate between Chief Arbitrator Grodin and Attorney Levin was heard by RDC's counsel, James E. Cecchi, on May 21, 2004.

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[2] According to *Air Conditioning Equipment, Inc. v. Rogers*, 551 So. 2d 554, 557 (Fla. 4th DCA 1989), once the parties agreed to submit to arbitration, the Florida Arbitration Code limits the authority of the court to interfere in the process prematurely.

Attorney Cecchi heard this conversation and took no action regarding the conversation until after RDC received the adverse award on August 8, 2004.

16. On August 11, 2004, RDC's counsel wrote to the AAA and provided the AAA with a copy of the Petition to Vacate filed on August 9, 2004, in circuit court and requested a full disclosure by Chief Arbitrator Grodin of his entire relationship with Attorney Levin.

17. On August 27, 2004, the parties received Chief Arbitrator Grodin's supplemental disclosure which stated, in relevant part, as follows:

> I drafted our Rabbi's employment contract for a Synagogue committee, which is negotiating it with Mr. Levin who serves as the Rabbi's representative. I advised the committee at the outset that I would not and could not have any contact with Mr. Levin on this matter.

18. After receipt of Chief Arbitrator Grodin's supplemental disclosure, both parties presented their respective client's positions by letter to the AAA regarding Mr. Grodin's continued service on the arbitration panel. RDC objected to Chief Arbitrator Grodin's continued service on the panel. Apostolicas did not object to Chief Arbitrator Grodin's continued service on the panel.

19. On September 17, 2004, the AAA reaffirmed Mr. Grodin as an arbitrator in the matter.

20. On October 11, 2004, the AAA advised the parties that Chief Arbitrator Grodin had resigned as arbitrator in the matter and that Arbitrators Lussier and Goldstein would continue with the arbitration process pursuant to the Arbitration Order dated September 21, 2004.

21. On October 25, 2004, the remaining two arbitrators, James R. Lussier and Joseph L. Goldstein, rendered the Final

Arbitration Award. The remaining two arbitrators reaffirmed the entire Interim Arbitration Award with the exception of the last three sentences, which were vacated, The modified Interim Arbitration Award was incorporated in the Final Arbitration Award by reference and declared to be the Final Arbitration Award in the matter. Apostolicas, individually and derivatively of Heathrow Golf, was reaffirmed as the prevailing party in the arbitration. RDC was held solely responsible for payment of all administrative fees and expenses of AAA and the arbitrators. The Final Arbitration Award was a full settlement of all claims submitted to arbitration.

22. RDC filed its Petition to Vacate on August 9, 2004 in Case No. 1740. Apostolicas filed a Petition for Confirmation of the Final Arbitration Award on November 2, 2004 in Case No. 2315. These cases were consolidated by order entered February 8, 2005 and were set for trial for May 4, 5, and 6, 2005. Because there was a legitimate disputed factual issue concerning the adequacy of the Chief Arbitrator's disclosure, the court allowed discovery on that issue. At trial, the court bifurcated proceedings on the issue of fees and costs and on the issue of a receivership pending ruling on the issues presented for trial.

23. RDC requests that the court vacate the Interim and Final Arbitration Award because of the evident partiality of former Chief Arbitrator Grodin. RDC does not allege actual bias or partiality on the part of former Chief Arbitrator Grodin. No objections have been filed against the majority panel members, James R. Lussier and Joseph I. Goldstein.

THE LAW

24. In Florida, arbitration is a favored means of dispute resolution and courts should indulge every reasonable presumption to uphold proceedings resulting in an award. *Roe v. Amica Mut. Ins. Co.*, 533 So. 2d 279, 281 (Fla. 1988).

However, the Florida Arbitration Code, chapter 682, provides several bases upon which a court may vacate an award. The statutory specified grounds enumerated in the Florida Arbitration Code are the sole grounds upon which an arbitration award can be vacated. *State Dept of Insurance v. First Floridian Auto and Home Ins. Co.*, 803 So. 2d 771 (Fla. 1st DCA 2001); *Verzura Const, Inc. v. Surfside Ocean, Inc.*, 708 So. 2d 994 (Fla. 3d DCA 1998). Section 682.13(1)(b), Florida Statutes (2004), requires vacatur of an arbitration award where "there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or umpire or misconduct prejudicing the rights of any party."[3] "Evident partiality" is a basis for vacation only in the case of a neutral arbitrator. *Lee v. Marcus*, 396 So. 2d 208, 209 (Fla. 3d DCA 1981).

25. As pointed out by the court in *Continental Insurance Co. v.Williams*, 1986 WL 20915 (S.D. Fla. 1986) (Not reported in Federal Supplement), "No jurist has yet coined an exacting legal standard for 'evident partiality', although many have tried." An "evident partiality" inquiry is by its very nature case-specific and fact-intensive. See *Lifecare Intern., Inc. v. CD Medical, Inc.*, 68 F.3d 429, 435 (11th Cir. 1995) (question is "fact intensive" and "highly dependent on the unique factual settings of each particular case").

26. The seminal case in this area is the Supreme Court's decision in *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968), which involved the question of whether elementary requirements of impartiality taken for granted in every judicial proceeding are suspended when the parties agree to resolve a dispute through arbitration. In *Commonwealth Coatings*, the Supreme Court set aside the arbitration award for evident partiality where the arbitration

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[3] The court treats Chief Arbitrator James Grodin as "an arbitrator appointed as a neutral."

did not disclose his close financial relations with a contractor that had existed for many years. *Id.* at 148-149. These close business connections were not made known to the losing party to the arbitration until after an award had been entered. Justice Black, writing for a plurality of the Court, stated:

> It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias. *Id.*

Justice White, in a concurring opinion, stated:

> The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. it is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function . . . This . . . means that arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial,
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> * * *
>
> Of course, an arbitrator's business relationships may be diverse indeed, involving more or less remote commercial connections with great numbers of people. He cannot be expected to provide the parties with his complete and unexpurgated business biography. But it is

> enough for present purposes to hold, as the Court does, that where the arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed. If arbitrators err on the side of disclosure, as they should, it will not be difficult for courts to identify those undisclosed relationships which are too insubstantial to warrant vacating an award. Id. at 150-152.

27. In *Lifecare Intern. Inc. v. CD Medical, Inc.*, 68 F.2d 429, 432 (11th Cir. 1995), the Eleventh Circuit stated the test for evident partiality in nondisclosure cases as follows:

> In order to vacate on the ground of evident partiality in a nondisclosure case, the party challenging the arbitration award must establish that the undisclosed facts create a "reasonable impression of partiality." *Middlesex Mut. Ins, Co. v Levine*, 675 F.2d 1197, 1201 (11th Cir.1982); *Schmitz v. Zilverti*, 20 F.3d 1043, 1048 (9th Cir.1994). The Court has reasoned that the alleged partiality must be "direct, definite and capable of demonstration rather than remote, uncertain and speculative." *Levine*, 675 F.2d at 1201; *accord, Consol. Coal v. Local 1643, United Mine Workers*, 48 F.3d 125, 129 (4th Cir. 1 995); *Health Services Management Corn. v. Hughes*, 975 F.2d 1253, 1264 (7th Cir.1992). Accordingly. the mere appearance of bias or partiality is not enough to set aside an arbitration award. *Consol. Coal*, 48 F.3d at 129; *Health Services Management Corp.*, 975 F.2d at 1264; *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 173 (2d Cir.1984); *see Schmitz*, 20 F.Sd at 104647 (rejecting "appearance of bias" standard). (Emphasis added).

28. Most recently in *University Commons-Urbana Ltd. v. Universal Constructors, Inc.*, 304 F.3d 1331, 1339 (11th Cir. 2002), the Eleventh Circuit ruled as follows:

> an arbitration award may be vacated due to the "evident

> partiality" of an arbitrator only when either (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose information which would lead a reasonable person to believe that a potential conflict exits. Gianaeili *Money Purchase Plan & Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir.1998) (citing *Lifecare Int'l, Inc. v. CD Med., Inc.*, 68 F.3d 429, 433 (11th Cir. 1995) and *Middlesex Mut. Ins. Co., v. Levine*, 675 F.2d 1197, 1202 (11th Cir.1982).

29. In *Deen v. Oster*, 814 So. 2d 1065, 1068 (Fla. 4th DCA 2001), the Fourth District defined when evident partiality by an arbitrator appointed as a neutral requires vacatur:

> However, the Florida Arbitration Code, chapter 682, provides for several bases upon which a court can vacate an award. One is if "there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or umpire or misconduct prejudicing the rights of any party." § 682.13(1)(b), Fla. Stat. (2000). This section requires an arbitrator to avoid even the appearance of partiality. *See Intl Ins. Co. v. Schrager*, 593 So.2d 1196, 1197 (Fla. 4th DCA 1992). Therefore, an arbitration award must be set aside upon the "showing of circumstances which would reasonably tend to bias the judgment of an impartial arbitrator." *Boyhan v. Maguire* 693 So.2d 659, 662 (Fla. 4th DCA 1997).

WAIVER

30. Apostolicas argues that RDC waived its objection to any conflict or bias on the part of former Chief Arbitrator Grodin. The court does not agree.

31. The Chief Arbitrator's initial disclosure that he and Attorney Levin belonged to the same Synagogue did not reasonably put RDC on notice that they would be volunteering to work on the renewal of Rabbi Rubinger's ("Rabbi") engagement contract at their Synagogue, the Congregation

Obey Shalom ("COS"), during the arbitration proceeding, nor was it designed to do so. Chief Arbitrator Grodin's initial disclosure took place approximately one year before the COS began the Rabbi's contract renewal.

32. The disclosure made by the Chief Arbitrator on the first day of the arbitration hearing, May 3, 2004, that the arbitrators and attorneys know each other, did not put RDC on notice of the role played by the Chief Arbitrator and Attorney Levin in the Rabbi's contract renewal, nor was it designed to do so. On May 3rd, Chief Arbitrator Grodin, along with everyone else involved with the Rabbi's contract renewal, thought the Rabbi's contract renewal was a "done deal."

33. The brief conversation that Attorney Cecchi heard between the Chief Arbitrator and Attorney Levin on May 21, 2004, was the first time that RDC had any kind of notice of the Rabbi's contract renewal.

34. Apostolicas argues that when Attorney Cecchi heard the May 21st conversation, RDC was put on notice that the Chief Arbitrator and Attorney Levin were somehow involved with a rabbi's contract. Apostolicas argues that RDC should be foreclosed from now objecting about this issue because RDC did not timely raise this issue with the AAA, and did not timely inquire further into the details of the Chief Arbitrator's relationship with Attorney Levin after hearing the conversation, until RDC received the unfavorable Interim Arbitration Award on August 9, 2004. The court cannot agree, although the only event that occurred between the time that RDC heard the May 21st conversation and the filing of RDC's Petition to Vacate on August 9, 2004, was RDC's receipt of the unfavorable Interim Arbitration Award on August 6, 2004.

35. Waiver is the intentional or voluntary relinquishment of a known right. *Costello v. The Curtis Building Partnership.*

864 So. 2d 1241, 1244 (Fla. 5th DCA 2004). In this case, the *May 21st conversation did not provide RDC with actual* knowledge of the facts surrounding the Rabbi's contract renewal, nor provide RDC with enough information to trigger a responsibility on the part of RDC to perform its own investigation or inquire further of the AAA. RDC should have been able to rely on the disclosures made by the Chief Arbitrator.

36. The information heard by RDC in the May 21st conversation between Chief Arbitrator Grodin and Attorney Levin was insufficient information to give rise to a waiver of an objection arising out of that information. RDC has not waived its objection to former Chief Arbitrator Grodin.

EVIDENT PARTIALITY

37. Because there are no allegations of actual conflict or bias in this case, to vacate an arbitration award on the theory that undisclosed facts establish 'evident partiality," RDC must show that the undisclosed circumstances would reasonably tend to bias the judgment of Chief Arbitrator Grodin. See *Deen v. Oster*, supra; *Boyhan v. Maguire*, supra. In this case, the undisclosed facts do not show circumstances which would reasonably tend to bias the judgment of Chief Arbitrator Grodin in favor of Michael Levin or his client, Apostolicas.

38. On January 31, 2003, Mr. Grodin made his initial disclosure that he and Attorney Levin were members of the same Synagogue. Approximately one year later, unbeknown to RDC, Messrs. Grodin and Levin's Synagogue, the COS, decided to renew its engagement contract with its Rabbi. In February of 2004, the Executive Board of COS held a meeting and appointed Bill Sholk[4] and Jim Grodin[5] to

[4] Bill Sholk is a mortgage broker and served as President of the Executive Board of COS during the 1996/1997 time frame.

negotiate the Rabbi's new employment contract,[6] Bill Sholk was present at this meeting: Jim Grodin was not, When Bill Sholk called Jim Grodin about the Rabbi's new contract, Jim Grodin told Bill Sholk that he would not work with Michael Levin because of this pending arbitration and that Bill Sholk would have to negotiate the contract for the Synagogue, It is clear from the evidence that Bill Sholk agreed to negotiate the terms of the contract for the Synagogue and that Jim Grodin agreed to draft the contract.

39. The court accepts the testimony of Bill Sholk as credible. The term sheets for the Rabbi's contract were negotiated by Bill Sholk and Michael Levin from March to April of 2004. Bill Sholk was not set up as a "middle-man," as argued by RDC but, in fact, served as the negotiator on behalf of the Synagogue. Jim Grodin provided legal counsel to Bill Sholk and drafted the Rabbi's contract on behalf of the Synagogue. Jim Grodin prepared all the drafts of the Rabbi's contract.

40. Jim Grodin was not a decision-maker with respect to the Rabbi's new contract. The congregation and Executive Board of COS and the Rabbi were the decision-makers.

41. It is uncontroverted that by April 18, 2004. Bill Sholk and Michael Levin reached complete agreement on all issues regarding the Rabbi's new 15 year/3 million dollar contract. On April 18, 2004, the renewal of the Rabbi's contract was taken before the COS at its Annual Meeting and the con-

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[5] Jim Grodin, an attorney with Foley and Lardner, has been a member of COS since 1988. As a past president of the COS, Sim Grodin remained a member of the Executive Board of 005, but has not been active with the Executive Board, nor attended any Board meetings, since 2002.

[6] The Rabbi has an existing four year employmeat contract with 00$ that ends in August of 2005. Jim Grodin drafted this contract and the Rabbis earlier contract with COS dating back to 1995. COS wanted to negotiate a new contract with the Rabbi before the existing contact expired.

gregation voted to renew the Rabbi's contract for 15 years/3 million dollars, with the terms as negotiated by Bill Sholk and Michael Levin, The same evening as the COS Annual Meeting, the Executive Board of the COS met and also approved the 15 year/3 million dollar contract as presented. After the April 18th meetings, when the business deal was negotiated and agreed upon by the Rabbi, the COS, and COS's Executive Board, the new contract terms were sent by Bill Sholk to Jim Grodin for Jim Grodin to "plug in terms."

42. The first draft of the Rabbi's contract as prepared by Jim Grodin was emailed to Bill Sholk on April 27, 2004. This draft was forwarded by Bill Sholk to Michael Levin on April 29, 2004. The April 27th contract was complete and included all of the negotiated terms. On April 27, Bill Sholk e-mailed Michael Levin and told him that this contract was going to be taken to the Board on April 27th at a special meeting for the sole purpose of the congregation formally agreeing on the contract. Bill Sholk ended this e-mail to Michael Levin by stating as follows, "We will get the blessing tomorrow night and after you look at and approve the contract, both sides can sign and put this to bed."

43. The arbitration hearing in this case began several days later on May 3, 2004, and concluded on May 21, 2004. It was on May 21, 2004, at the end of the arbitration hearing as everyone was leaving that Chief Arbitrator Jim Grodin generally said to Michael Levin in the presence of, at least, Attorney Cecchi, "When you review the Rabbi's contract, please look at the footnotes because I may have made a mistake in the footnotes." Michael Levin apologized that he had not yet had an opportunity to review the contract, but told the Chief Arbitrator he would review the contract on the plane.

44. On June 11, 2004, Michael Levin began contract negotiations again by raising severance and disability issues. Disability became a contentious issue between Bill Sholk and

Michael Levin for two reasons: (1) Bill Sholk thought Michael Levin was trying to change their previous agreement which had already been voted on and approved by the COS and (2) Bill Sholk was irritated by Michael Levin's strident and 'obnoxious" e-mails. The e-mails produced by Jim Grodin reveal that Jim Grodin and Michael Levin were directly and indirectly receiving and sending e-mails regarding the Rabbi's employment contract from June 11th to June 18th and from July 2nd to July 8th. The direct e-mails between Jim Grodin and Michael Levin occurred because Bill Sholk and Michael Levin began "sparking" with each other.

45. The key e-mails between June 11 and June 18, 2004, are summarized as follows:

06/11/04 E-mail from Michael Levin to Bill Sholk, cc: Rabbi, B, Yarmuth, Burt Chasnov, J. Bornstein, Jim Grodin. (I have been immersed in an arbitration immediately followed by a family trip to England . . . Because of the delay and the possibility that you are now on vacation, I am taking the liberty of forwarding this draft to Burt Chasnov, Jim Grodin and Jeff Bornstein, all of whom I understand to be involved on your side of the negotiations.)

06/14/04 E-mail from Bill Sholk to Michael Levin (The changes that were made to the disability section . . . They are material to the contract and were agreed upon by both sides. We are now re-negotiating the contract which has been voted on and approved by the executive board and board . . .)

06/14/04 E-mail from Michael Levin to Bill Sholk (. . . We are not re-negotiating and simply trying to document the deal made. You are equally wrong about . . .)

06/14/04 E-mail from Michael Levin to Bill Sholk (I also would point out that it is not productive to make accusations of "re-negotiating" . . . Let's get this put to bed.)

06/14/04 E-mail from Bill Sholk to Burt Chasnov, cc: Jim Grodin, J. Bornstein Subject: another salvo fired from Levin.

06/14/04 E-mail from James Grodin to Michael Levin, Subject: Discretionary Fund (Mike—I have been following the emails. Here is the problem . . . . This is really a bit of a tempest in a teapot. . . .)

06/15/04 E-mail from Jim Grodin to Michael Levin (As my kids used to say, my tummy is getting tired.)[7]

06/16/04 E-mail from Michael Levin to Bill Sholk (You are fundamentally wrong . . .)

6/16/04 E-mail from Michael Levin to Bill Sholk (Bill, attached is an e-mail that I received this morning from the Rabbi. He has asked me to share the email with you and your team)

6/16/04 E-mail from Jim Grodin to Michael Levin, Subject: Some Synagogue History you need to know (Call me on my cell. Jim)

6/16/04 E-mail from Michael Levin to Jim Grodin, Subject: Some Synagogue History you need to know (I left a message on your cell. My cell is 321-439-4863. I am meeting Judy for lunch at 1 but otherwise can be reached on the cell all day.)

6/16/04 E-mail from Jim Grodin to Michael Levin, Subject: Some Synagogue History you need to know (I'll call when I finish my meeting.)

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[7] Jim Grodin's oldest son (now a doctor) used to say this as a young child when he was frustrated.

6/16/04 E-mail from Michael Levin to Bill Sholk, cc: Burt Chasnov, Jim Grodin, J. Bornstein, Rabbi, B. Yarmuth (Hello, all. Following conversations with Jim Grodin and Rabbi Rubinger this afternoon; I am working on a new proposal on the disability issue that I hope to present sometime later this evening. Jim, I will write it so that it can be dropped into the draft contract if acceptable to all.)

6/16/04 E-mail from Jim Grodin to Michael Levin, Bill Sholk cc: Burt Chasnov, J. Bornstein, Rabbi, B. Yarmuth (Thanks Mike)

6/17/04 E-mail from Michael Levin to Bill Sholk, Jim Grodin, B. Chasnov, J. Bornstein. (Rabbi and I worked late last night on a new proposal on the disability issue. I am waiting for his final comments and hope to get it to you by mid-morning . . .)

6/17/04 E-mail from Michael Levin to Bill Sholk, J. Grodin, B. Chasnov, J. Bornstein, Subject: Attached is a proposed compromise on the disability provision. Please let me know your comments.

06/18/04 E-mail from Michael Levin to Jim Grodin, Bill Sholk. (I was just wondering if there is any response to our proposal on the disability issue . . .)

6/18/04 E-mail from Jim Grodin to Michael Levin (I am out of the loop on the negotiating end. You have to check with Bill.)

46. , On June 16, 2004, Jim Grodin called Michael Levin on the telephone to tell him to "cut the crap," come up with a new suggestion and that the contract was going nowhere, that

he needed to be positive, and to explain to Michael Levin the history behind the language in an earlier rabbi's contract with COS. The court accepts Jim Grodin's testimony regarding this telephone conversation with Michael Levin as credible. Jim Grodin and Michael Levin did not discuss the substantive terms of the current Rabbi's contract renewal during this telephone call. The evidence establishes that Jim Grodin and Michael Levin did not discuss the pending arbitration during this telephone call.

47. On June 18, 2004, the parties submitted their proposed Memorandum of Arbitration Decision to the Arbitration Panel.

48. From July 2 through July 8, 2004, the disability and severance issues were resolved. Severance was not a contentious issue and was not included in the Rabbi's contract. Disability was a contentious issue between Bill Sholk and Michael Levin. Bill Sholk sought counsel from Jim Grodin on how to deal with Michael Levin during this time frame. Ultimately, Bill Sholk and Michael Levin reached agreement on the disability issue on July 8, 2004.

49. On July 7, 2004, the Arbitration Panel declared the arbitration closed.

50. From July 8, 2004, until August 9, 2004, Michael Levin had no contact with anyone regarding the Rabbi's contract, except the Rabbi.

51. On August 6, 2004, the three-member Arbitration Panel issued the Interim Arbitration Award.

52. On August 9, 2004, Bill Sholk e-mailed Jim Grodin and stated that "Michael Levin just wanted to know when we thought we would have a contract for him to look at?"

53. On August 9, 2004, the Petition to Vacate was filed in circuit court by RDC.

54. On September 9,2004, the Rabbi's contract was signed.

55. On October 11, 2004, Jim Grodin resigned as arbitrator, On October 25, 2004, the majority panel of Arbitrators, Lussier and Goldstein, reaffirmed the Interim Award, except for the last three sentences, and rendered the Final Arbitration Award.

56. Florida requires that "evident partiality" be found only where a reasonable person would conclude that the undisclosed circumstances would tend to bias the judgment of a neutral arbitrator. The alleged partiality must be direct, definite, and capable of demonstration rather than remote, uncertain, and speculative. A reasonable person looking at the undisclosed circumstances in the instant case would conclude that Jim Grodin's involvement with the renewal of the Rabbi's engagement contract and relationship with Michael Levin would not "tend to bias his judgment" in the arbitration proceeding.

57. RDC argues that Jim Grodin's undisclosed involvement with the Rabbi's engagement contract renewal requires vacatur because it was: (a) concurrent with the arbitration: (b) fraught with numerous opportunities for ex-parte contact and favoritism; and (c) material as to time, value and relationship.

58. The Rabbi's contract renewal did occur during the parties' arbitration proceeding. The Rabbi's contract renewal began in early 2004 and ended on September 9, 2004, when the Synagogue and Rabbi signed the new engagement contract. The parties' arbitration began on October 2, 2002, and ended with the rendition of the Final Arbitration Award on October 25, 2004. Clearly, the undisclosed relationship between Jim Grodin and Michael Levin occurred during the arbitration proceedings, including the arbitration hearing, deliberation and rendition of the Arbitration Award.

59. While Jim Grodin's undisclosed relationship with Michael Levin was concurrent with the arbitration proceedings, this relationship was not a substantial relationship.

There were no exparte communication between Jim Grodin and Michael Levin regarding the subject matter of the arbitration proceeding. The arbitration was mentioned in the Rabbi's contract renewal one time in an e-mail from Michael Levin to Bill Sholk dated June 11. 2004 which stated, in relevant part, as follows: "I have been immersed in an arbitration immediately followed by a family trip to England... Because of the delay and the possibility that you are now on vacation, I am taking the liberty of forwarding this draft to Bud Chasnov, Jim Grodin and Jeff Bornstein, all of whom I understand to be involved on your side of the negotiations." This e-mail was also copied to Burt Chasnov, Jim Grodin and Jeff Bornstein by Michael Levin. The arbitration was also mentioned by Jim Grodin to Bill Sholk at the beginning of the contract renewal process as the reason that Jim Grodin would not negotiate the Rabbi's new contract with Michael Levin.

60. RDC correctly argues that the Rabbi's contract that was renewed for 15 years and 3 million dollars was a material contract. While this clearly was a material contract for the COS and the Rabbi, this material contract did not create a substantial relationship between Jim Grodin and Michael Levin. Both attorneys were volunteering their time and their talents to help their Synagogue renew its contract with its Rabbi. Jim Grodin already had previous COS engagement contracts on his computer because he had produced several other employment contracts on behalf of the COS for this Rabbi and other rabbis and cantors.

61. By the time Jim Grodin became involved with the instant contract renewal, both the congregation of COS and its Executive Board had already voted to approve a 15 year/3 million dollar engagement contract for its Rabbi and these material terms were never an issue. While the disability issue was also a material issue, a contentious issue and an issue with which Jim Grodin had some involvement, it is uncon-

troverted that the disability issue could not have been a deal breaker. Bill Sholk testified that the Rabbi was staying, that one item would not be a deal breaker, and that they just needed to reach an agreement. The court accepts this testimony as credible and assigns little weight to the fact that the disability issue became a contentious issue for a period of time during the June 11th-18th and July 2nd-8th negotiations and to the fact that Jim Grodin had some involvement with the disability issue or any of the contract issues. The Rabbi's written engagement contract was going to be finalized, it was lust a matter of when. The COS had already voted to keep their Rabbi for fifteen years, until the Rabbi retired. The length and salary had already been agreed upon by both the COS and the Rabbi. The terms of the contract, even material ones, were going to be worked out because the congregation wanted this Rabbi as their Rabbi until he retired. This was volunteer Synagogue work and Jim Grodin wanted to expeditiously finalize the Rabbi's new engagement contract.

62. Michael Levin did not do anything in the Rabbi's contract renewal that curried favor with Jim Grodin in the arbitration proceeding. There were no real life opportunities for a "quid pro quo" created by the undisclosed circumstances in this case. The "Thanks Mike" e-mail from Jim Grodin to Michael Levin on June 16, 2004, for making a different proposal on the disability issue proposal is not evidence that Michael Levin had curried favor with Jim Grodin in the arbitration proceeding. A review of Jim Grodin's relationship with Michael Levin in the Rabbi's contract renewal would not lead a reasonable person to believe that a potential conflict exists in the arbitration proceeding.

63. RDC argues that former Chief Arbitrator Grodin's non-disclosure was designed to conceal his relationship with Attorney Levin. The court disagrees. The court notes that Jim Grodin made a general disclosure that he and Michael Levin were members of the same Synagogue. There is no evidence

to establish that the Chief Arbitrator's non-disclosure in this case was calculated to conceal his involvement in the Rabbi's contract renewal. The court bases this conclusion in part on the fact that Chief Arbitrator Grodin spoke openly to Attorney Levin in front of, at least, Attorney Cecchi about the Rabbi's contract renewal. This is not conduct consistent with a plan to conceal Jim Grodin's involvement with the Rabbi's contract renewal. The court concludes from all the evidence that former Chief Arbitrator Grodin did not disclose his involvement in the Rabbi's contract renewal because he thought his involvement was trivial.

64. A reasonable person, considering all the undisclosed evidence in this case, would not conclude that Jim Grodin's involvement with Michael Levin in the Rabbi's contract renewal would tend to bias his judgment in favor of Apostolicas or Michael Levin in the arbitration proceeding. RDC has not established that the undisclosed facts in this case "might create an impression of possible bias" towards Apostolicas or Michael Levin in the arbitration proceeding. There is no "evident partiality" in this case.

DISCLOSURE

65. The evidence establishes that Chief Arbitrator Grodin drafted the Rabbi's contract on behalf of the Synagogue and served as the attorney for the Synagogue and that Bill Sholk negotiated the terms of the contract on behalf of the Synagogue. Michael Levin represented the Rabbi In the contract negotiations. The drafting and negotiation of the Rabbi's contract occurred concurrent with the arbitration proceedings, including the arbitration hearing and deliberations. RDC was unaware of the roles Messrs. Grodin and Levin played in the renewal of the Rabbi's contract until RDC filed its Petition to Vacate the Interim Arbitration Award.

66. Canon II of the AAA Code of Ethics for Arbitrators in Commercial Disputes provides that an arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality. Any doubt as to whether or not disclosure is to be made should be resolved in favor of full disclosure. Rule 19 of the AAA Commercial Arbitration Rules provides as follows:

> Any person appointed as a neutral arbitrator shall disclose to the AAA any circumstances likely to affect impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.

Rule 16 of the AbA Commercial Arbitration Rules governs disclosure. Rule 16(a) provides as follows:

> Any person appointed or to be appointed as an arbitrator shall disclose to the MA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration.

67. The court concludes that Chief Arbitrator Grodin should have fully disclosed his involvement with Michael Levin in the renewal of the Rabbi's engagement contract. The Chief Arbitrator did not do so in a timely manner during the arbitration proceeding.

68. As stated by the Fourth District in *Weinger v. State Farm Fire & Casualty*, 620 So. 2d 1298, 1299 (Fla. 4th DCA

1993), "It is now very clear that an arbitrator has an affirmative duty to disclose any dealings that might create an impression of possible bias." The *Weinger* court continued, "Failure to disclose such an association undermines the appearance of propriety and the confidence of the fairness of the proceedings and requires the vacation of the award." Id. While the undisclosed circumstances in this case do not rise to the level of "might create an impression of possible bias," Chief Arbitrator Grodin should have fully disclosed them anyways. For the reasons stated in this Order, former Chief Arbitrator Grodin's non-disclosure does not warrant vacating the Final Arbitration Award.

VACANCY CREATED BY
RESIGNATION OF CHIEF ARBITRATOR

69. On October 11, 2004, the AAA advised the parties that Chief Arbitrator Grodin had resigned as arbitrator in the matter and that Arbitrators, Lussier and Goldstein would continue with the arbitration process pursuant to the Arbitration Order dated September21, 2004.

70. Former Chief Arbitrator Grodin did not sign the Final Arbitration Award that RDC asks this court to vacate. Chief Arbitrator Grodin resigned as an arbitrator after the arbitration hearing was held and the Interim Arbitration Award was rendered. Noting that the Chief Arbitrator had resigned, the majority panel of Arbitrators, Lussier and Goldstein, issued the Final Arbitration Award after the majority panel reaffirmed the interim Arbitration Award, except for the last three sentences thereof. Therefore, former Chief Arbitrator Grodin played no role in the rendition of the Final Arbitration Award. RDC has not objected to Arbitrator Lussier or Goldstein.

71. All of the cases argued by RDC to support its Petition to Vacate address vacatur of a final arbitration award due to the evident partiality of an arbitrator that took part in the

final arbitration award. We do not have that factual situation in this case.

72. The arbitration in this case was conducted pursuant to the Florida Arbitration Code. Section 682.05, Florida Statutes, reads as follows:

> 682.05 Majority action by arbitrators,—The powers of the arbitrators may be exercised by a majority of their number unless otherwise provided in the agreement or provision for arbitration.

73. Additionally, Section 682.06(3), Florida Statutes, governs the hearings as follows:

> 682.06 Hearing.—Unless otherwise provided by the agreement or provision for arbitration:
>
> * * *
>
> (3) The hearing shall be conducted by all of the arbitrators but a majority may determine any question and render a final award, An umpire authorized to hear and decide the cause upon the failure of the arbitrators to agree upon an award shall sit with the arbitrators throughout their hearing but shall not be counted as a part of their quorum or in the making of their award. If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrator, arbitrators or umpire appointed to act as neutrals may continue with the hearing and determination of the controversy.

74. In this case, there was no evidence that the parties had an agreement or provision for arbitration that required all three arbitrators to render the final award or that required unanimity. in the absence of such an arbitration agreement or provision, a majority of the arbitrators are authorized to re-affirm an interim award and enter a final award.

75. Where a dispute concerning the disposition of a security deposit made by a lessee under a lease agreement was

submitted to arbitrators and the arbitrator selected by the lessee resigned prior to entry of the award, it was held in *Cassara v. Wofford*, 55 So. 2d 102 (Fla. 1951), that this resignation did not, per se, invalidate the award made by the remaining arbitrators. The Florida Supreme Court in *Cassara* stated that, "One arbitrator, or a minority of arbitrators, cannot, after a dispute has been fully submitted to a board of arbitration, defeat an award by resigning, withdrawing, or otherwise refusing to participate in the hearings, since under our statute a majority of arbitrators are authorized to enter the award." The court in Cassara further noted that Florida's Arbitration Code has not changed the common-law rule that all arbitrators shall sit at the hearings and hear the evidence. The reason for this rule is that the parties have a right to the presence and the argument, experience, and counsel of each arbitrator during the whole process, so that a minority vacancy occurring after the dispute has been fully submitted to the whole arbitration panel amounts, for all practical purposes, to a dissent by the absent member, and does not terminate the authority of the remaining members of the panel to make a majority award. See *Effect of Vacancy Through Resignation, Withdrawal, or Death of One or Multiple Arbitrators on Authority of Remaining Arbitrators to Render Award*, 49 A.L.R. 2d 900 Art. III, B, §10, 11.

76. In Travelers Indem. Co. v. Walton, 384 So. 2d 939 (Fla. 3rd DCA 1980), the Third District held that where an arbitration award was rendered upon the concurrence of two arbitrators, any error due to the third arbitrator's lack of opportunity to express his vote and join the final award was harmless.

77. In the Instant case, all three arbitrators were present at the hearing, heard all the evidence, deliberated, and rendered the Interim Arbitration Award. After the dispute was fully submitted to the three-member arbitration panel, but before entry of the Final Arbitration Award, Chief Arbitrator Grodin

resigned as arbitrator in the mailer. Therefore, pursuant to the Florida Arbitration Code, the majority Arbitrators, Lussier and Goldstein, were authorized to render the Final Arbitration Award,

Based on the above, the court ORDERS and ADJUDGES as follows:

1. RDC'S Amended Petition to Vacate Arbitration Award and Counter-Petition to Vacate interim and Final Arbitration Awards are DENIED.

2. Apostolicas' Petition for Confirmation at the Final Arbitration Award is GRANTED. The Final Arbitration Award is CONFIRMED.

3. The court declined to hear Apostolicas' request to appoint a receiver time that an order was rendered on the parties' petitions. Either party may re-notice the receivership issue for hearing before the Honorable James E.C. Perry.

4. The court reserves jurisdiction on the issue of attorneys' fees and costs. Either party may notice this issue for hearing before the Honorable James E.C. Perry.

DONE AND ORDERED in Chambers at Sanford, Seminole County, Florida, this 25th day of June, 2005.

/s/ Donna L. McIntosh
DONNA L. MCINTOSH, Circuit Judge

I HEREBY CERTIFY that true and correct copy of the foregoing has been furnished via U.S. mail this 22nd day of June, 2005, to:

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